

Professional Responsibility and the Report of Foreign Bank and Financial Accounts

There have been some questions about professional responsibility and the Report of Foreign Bank and Financial Accounts (FBAR). The FBAR, TD F 90-22.1, is not a tax return. It is an information report required under the Bank Secrecy Act (BSA), 31 U.S.C. 5314, and related regulations 31 C.F.R. 103.24, 103.27. Related records are required under 31 C.F.R. 103.24 and 103.32. This report, however, is referenced in US tax returns. These tax returns request information about the existence of foreign financial accounts in which the filer of the tax return has a financial interest or over which the filer has signature or other authority. If the response to the leading question is “yes,” then the tax return filer is prompted to file an FBAR.

In 2003 IRS was delegated responsibility for assessing penalties for failure to file this report. In 2004, Congress substantially increased penalties for failure to file the FBAR and created a non-willfulness penalty of up to \$10,000 for individuals as well as other entities. As a result, there has been increased interest in compliance.

We understand that individuals required to file FBAR are defending against penalty impositions by blaming their preparers, on whom they reasonably relied, for failing to ask about the existence of a foreign bank account or to advise that an FBAR was required. As a result, some practitioners have expressed concerns about their duties and responsibilities under Circular 230 with respect to both the responses required on Schedule B and the preparation and filing of the TDF 90-22.1 FBAR form.

Practitioners who prepare an individual's Form 1040 have a duty under Circular 230 to inquire of their clients with sufficient detail to prepare proper and correct responses to the foreign bank account questions on Schedule B. The level of due diligence required is addressed in Circular 230, Section 10.22:

§10.22 Diligence as to accuracy.

Each attorney, certified public accountant, enrolled agent, or enrolled actuary shall exercise due diligence:

- (a) In preparing or assisting in the preparation of, approving, and filing returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;
- (b) In determining the correctness of oral or written representations made by him to the Department of the Treasury; and
- (c) In determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the Internal Revenue Service

Under Circular 230, Section 10.34(d), a practitioner may generally rely, in good faith and without verification, on information furnished by a client. However, good faith reliance contemplates that a practitioner will make reasonable inquiries when a client provides information that implies possible participation in overseas transactions/accounts subject to FBAR requirements. A practitioner may rely on information provided by a client in good faith. However, a practitioner may not ignore the implications of any information provided to or

actually known by the practitioner. If the information furnished by the client appears to be incorrect, inconsistent with other known facts, or incomplete, the practitioner is required to make further inquiry. The practitioner is also required by Circular 230, Section 10.34(c) to advise a client of any potential penalties likely to apply to a position taken on a return the practitioner is preparing or on which she or he is advising. If a determination is made that there is a foreign bank account to report on Schedule B, the practitioner is not obligated to prepare the FBAR form for the client unless the practitioner feels competent to do so and the client has agreed to this additional service. Notwithstanding the lack of obligation to prepare the FBAR, the practitioner does have an affirmative obligation to advise the client of the need to file the FBAR form and the consequences of failing to do so.

Additional inquiries about the FBAR filing requirements may be resolved by reading “FAQs regarding Report of Foreign Bank and Financial Accounts (FBAR),” and other FBAR information available on the IRS web site at www.irs.gov. Specific questions and comments may be emailed to the following address: FBARquestions@irs.gov.